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No. 93-2016

# In the Supreme Court of the United States

OCTOBER TERM, 1994

ITHACA INDUSTRIES, INC., PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether petitioner established that it had anything other than a zero basis for purposes of amortization deductions claimed with respect to an "assembled workforce" acquired from a predecessor business.

2. Whether, assuming that petitioner had a basis in the workforce, the court of appeals correctly held that it was nevertheless not entitled to an amortization deduction with respect to that basis.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 17 F.3d 684. The opinion of the Tax Court (Pet. App. 14a-43a) is reported at 97 T.C. 253.

### JURISDICTION

The judgment of the court of appeals was entered on February 23, 1994. A petition for rehearing was denied on March 22, 1994 (Pet. App. 44a). The petition for a writ of certiorari was filed on June 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTES INVOLVED

The relevant portions of 26 U.S.C. 167, 197, 332, 334 and 338 are reproduced in the Appendix, *infra*, 1a-13a.

## STATEMENT

This federal income tax case involves deficiencies for the years 1984 and 1985. It arises from petitioner's claim that it was entitled to amortization deductions under Section 167 of the Internal Revenue Code for the basis that it assigned to an "assembled workforce" (Pet. 2) that it acquired in the liquidation of a predecessor corporation.[1] Resolution of that claim presents two issues. The first is whether, under the Internal Revenue Code provisions applicable to the tax year in which the acquisition occurred, petitioner had any basis other than "zero" in the assembled workforce. If it did not, that ends the matter. The second question, reached only if petitioner had a basis in the workforce, is whether such basis allocated to that attribute of its business was subject to amortization. The relevant facts may be summarized as follows.

Petitioner was incorporated in September 1983 as the vehicle for acquiring all of the stock of Ithaca Industries, Inc. (Old Ithaca), which was a large manufacturer of private label undergarments. The acquisition was carried out in October 1983 with petitioner paying $110 million in cash and notes for the Old Ithaca stock. This acquisition of Old Ithaca stock was followed by the complete liquidation of Old Ithaca on the same date (Pet. App. 17a). At that time, Old Ithaca had an assembled workforce of 5,153 hourly production workers and a staff of 212 other employees at its 17 plant, warehouse and office facilities (*id.* at 18a). The fair market value of Old Ithaca's tangible and intangible assets was $160,135,000 (*id.* at 23a). Its basis in those assets is not revealed in

[1] 26 U.S.C. 167(a) authorizes a reasonable depreciation allowance for "property used in the trade or business" and "property held for the production of income."

the record. Following the liquidation, petitioner, which had been formed as New Ithaca Corp., changed its name to Ithaca Industries, Inc. (*id.* at 17a).

Petitioner apparently was of the view that its stock purchase, followed by the liquidation of Old Ithaca, would be treated as a purchase of Old Ithaca's underlying assets. That assumption would have been correct under Section 334(b)(2) of the Internal Revenue Code (Pet. App. 15a n.1), as it read prior to its repeal in 1982 by Section 224(b) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEPFA), Pub. L. No. 97-248, 96 Stat. 488. Under the former, repealed version of Section 334(b)(2), the acquisition of a controlling stock interest in a target corporation by "purchase," followed by the prompt complete liquidation of the newly acquired subsidiary into the acquiring corporation, was to be treated as a direct purchase of assets, rather than as a tax-free liquidation. The normal rule for the basis of property acquired in a tax-free liquidation was and is that the acquiring corporation takes a carryover basis from the liquidated corporation. 26 U.S.C. 334(b)(1). If, however, the special rules of former Section 334(b)(2) applied, the purchaser was allowed to treat its cost for the stock as its cost of the assets and could allocate that cost to the various assets received on liquidation in proportion to their respective fair market values—thereby obtaining a "stepped-up" rather than "carryover" basis for the assets.

The purchase of the Old Ithaca shares and the liquidation of Old Ithaca into petitioner occurred in October 1983, however, more than a year after the stepped-up basis rules of Section 334(b)(2) were repealed, and after the revised provisions of Section 334(b)(2) required that in the case of the liquidation of a subsidiary "the basis of the property in the hands of the

transferee shall be the same as it would be in the hands of the transferor." 26 U.S.C. 3341(b)(2) (1982). At the same time that the former Section 334(b)(2) was repealed, Congress enacted an entirely new and complex provision—Section 338 of the Code—which is effective after August 31, 1982. TEFRA § 224(a) and (d), 96 Stat. 485-486, 489. Under specified circumstances, Section 338 provides the taxpayer with an election to obtain a stepped-up basis in assets acquired in liquidation. There is no indication in this case, however, that petitioner made (or is deemed to have made) an election under that Section. Section 334(b)(2) remained in the Code after the enactment of Section 338, but in dramatically different form insofar as it related to transactions after Section 338's effective date. As generally applicable to the year 1983, the new Section 334(b)(2) provided a carryover basis for assets received in liquidation, as the Tax Court noted (Pet. App. 15a n.1).

Notwithstanding the repeal of the stepped-up basis rule of Section 334(b)(2), petitioner purported to treat its stock purchase as an asset purchase and allocated $ 7.7 million of the purchase price to the assembled workforce (Pet. App. 2a). In doing so, petitioner evidently made the further assumption that a workforce constitutes "property" to which a basis could be assigned under the former provisions of that Section. See also note 1, *supra*. If petitioner had instead used a carryover basis in the assets acquired from Old Ithaca, its basis in the workforce would have been "zero" because all the costs of hiring, training and compensating the workers had been deducted when incurred as expenses of Old Ithaca. See Tr. 390-392.

Petitioner assigned an average per capita amount to each employee in the assembled workforce and deducted that per capita amount from its gross income when a

worker's employment ended.[2] Under this rationale, petitioner claimed deductions for amortization of assembled staff and workforce in the amounts of $674,104 for 1984 and $1,884,422 for 1985 (Pet. App. 24a). The Commissioner disallowed these deductions, treating the amount of the purchase price that had been allocated to the assembled workforce as non-amortizable going-concern value.

The case went to trial in the Tax Court, where taxpayer and the Commissioner produced expert witnesses who testified as to the valuation and useful life of the assembled workforce. The Tax Court, distinguishing the case from the then recent district court decision in *Newark Morning Ledger Co.* v. *United States*, 734 F. Supp. 176 (D.N.J. 1990), concluded that "the assembled work force does not diminish in value as a result of the passage of time or through use" (Pet. App. 31a) and that "from the facts here present * * * petitioner's assembled work force was not a wasting asset" (*id.* at 32a).

Petitioner appealed to the Fourth Circuit, relying on this Court's decision in *Newark Morning Ledger Co* v. *United States*, 113 S. Ct. 1670 (1993). The court of appeals affirmed, although it did not use the same rationale as the Tax Court in reaching this result. It concluded that the instant case "presents a rather

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[2] Although the case was tried on the premise that petitioner was claiming amortization deductions for a pool of workers, it appears that it was in fact doing something very different on its tax returns. It allocated an overall basis to the workforce, divided that by the number of employees, and when an individual employee quit simply deducted the amount ascribed to one individual employee. See Tr. 382-383. But it also deducted the costs of hiring, training and compensating each employee; in short, there was an obvious double deduction. See *id.* at 381-383.

different set of circumstances" from those present in *Newark Morning Ledger* because "[a]n employee is not a subscription" (Pet. App. 10a). The court concluded that petitioner's workforce was not an amortizable asset "because its characteristics suggest no sufficiently accurate means of estimating its useful life" (*id.* at 11a).

## ARGUMENT

The decision below is correct and does not conflict with this Court's decision in *Newark Morning Ledger Co.* v. *United States*, 113 S. Ct. 1670 (1993), or with the decision of any other court of appeals. Moreover, the question presented in this case is not one of continuing general importance. In 1993, Congress added Section 197 to the Internal Revenue Code to permit taxpayers to amortize the demonstrated cost basis for an acquired assembled workforce over a 15-year period. 26 U.S.C. 197 (Supp. V 1993)). Further review is therefore not warranted.

1. As a threshold matter, petitioner has failed to establish as a matter of law that it had any basis whatever to amortize in the assembled workforce. In this respect, petitioner's entire case for an amortization deduction rests upon a fundamental misperception of the applicable statutory scheme.[3] In particular, petitioner relied for its claim to a $ 7.7 million basis in the assembled workforce on a statutory provision that was repealed more than a year before the transaction in which it acquired the stock of Old Ithaca. The acquisition of the stock of Old Ithaca in a taxable

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[3] We note that petitioner cites only Section 167 of the Code, and a section of the Treasury Regulations promulgated under Section 167, as the statute and regulation involved in this case. Petitioner does not cite Sections 334(b)(2), either before or after the 1982 amendments, or Section 338.

transaction (for which the consideration was cash and notes), followed promptly by the complete liquidation of old Ithaca into petitioner, would have been treated as a purchase of Ithaca's underlying assets *prior* to August 31, 1982, under the then existing provisions of Section 334(b)(2) of the Code. On that date, however, Section 334(b)(2) (which petitioner explicitly referred to in its Tax Court pleadings as the basis for its $ 7.7 million basis in the workforce) was repealed.[4] The stepped-up basis rule permitted by Section 334(b)(2) prior to August 1982 was replaced at that time by a somewhat similar, but considerably more complex, statutory provision, Section 338 of the Code. Unlike former Section 334(b)(2), however, the stepped-up basis provisions of Section 338 are elective. See 26 U.S.C. 338(a). A taxpayer desiring to take advantage of the new stepped-up basis rules must elect to do so within 75 days of the acquisition. 26 U.S.C. 338(g)(1). It is apparent that Section 338, not Section 334(b)(2), was the relevant statutory provision under which petitioner might have sought a stepped-up basis for property received on the liquidation of Old Ithaca.[5]

At no time, however, has petitioner indicated that it made (or should be deemed to have made) the required

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[4] The Tax Court noted this issue but did not pass on it because the Commissioner had not challenged petitioner's assertion that it was entitled to use Section 334(b)(2), as it read prior to its repeal on August 31, 1982, to obtain a stepped-up basis in the underlying assets. Instead, in the Tax Court, the Commissioner focussed on the position that a workforce was not an amortizable asset. See Pet. App. 16a n.1.

[5] A new Section 334(b)(2) remained in the Code after August 31, 1982, for tax years 1983 through 1985, but in dramatically different form, providing that property received in a corporate subsidiary's liquidation would take a carryover basis. 26 U.S.C. 334(b)(2) (1982).

election under Section 338. Accordingly, its basis in the assets acquired from Old Ithaca is the historical, carryover basis from Old Ithaca, which in the case of the workforce is "zero," even if one assumed that a workforce is "property" within the meaning of that Section. See also note 1, *supra*. The carryover basis of the workforce is "zero" because all of the expenses associated with the workforce, such as hiring, training and salaries, were deducted by Old Ithaca prior to the acquisition. In short, petitioner mistakenly relied on a repealed statute for the initial proposition that it had a basis to amortize.

We pointed this out in the court of appeals, where we acknowledged that the Commissioner had not clarified the applicable Code provisions in briefing the case in the Tax Court and had contested the claimed deductions on the more general ground that, whatever the value ascribed to the assembled workforce, it could not be differentiated from non-amortizable goodwill or going-concern value. In the court of appeals, however, we maintained that we were entitled, as appellee, to raise any ground for affirmance of the trial court's decision and could, of course, also point out to the court the terms of the controlling statute. The court of appeals acknowledged our argument but "decline[d] to pass on the merits of this question * * * principally because its development before us, and before the Tax Court, was incomplete" (Pet. App. 3a). It would, however, have been appropriate for the court of appeals to have decided the case on the basis of the inapplicability of Section 334(b)(2). As this Court pointed out in *Schweiker* v. *Hogan*, 457 U.S. 569, 585 n.24 (1982), the Commissioner's failure to challenge the statutory basis for petitioner's amortization claim cannot "waive" the operation of the

Code or change the date of the transaction for purposes of the applicable statute.

2. Even if petitioner had established that it had some positive basis in the assembled workforce, there is no merit to its contention (Pet. 10) that the decision of the court below conflicts with this Court's decision in *Newark Morning Ledger*. The Court held in *Newark Morning Ledger* that the costs of "customer-based intangibles" that generate a stream of income (such as customer lists, bank deposits, insurance expirations) and "any other identifiable asset the value of which obviously depends on the continued and voluntary patronage of customers" (113 S. Ct. at 1676) was not, as a matter of law, nondepreciable goodwill or going-concern value. Even if we make the highly dubious assumption that petitioner's assembled workforce is an item that has a basis in petitioner's hands, it is obviously not a "customer-based intangible" or other form of "property" for which depreciation would be available under 26 U.S.C. 167. See note 1, *supra*. It is, indeed, the exact opposite of a revenue-generating asset like a patent, copyright, or long-term contract, or the "core deposits" of a bank. In particular, unlike "customer-based intangibles," factory and office workers do not represent the value of continuing patronage to petitioner (but, rather, continuing wage costs). The court below was therefore obviously correct in observing that "[a]n employee is not a subscription" (Pet. App. 10a).

Petitioner has lost sight of this critical precondition of the Court's holding in *Newark Morning Ledger*—there must be a customer-based intangible or other form of revenue-generating "property" in the first place for depreciation to be allowed under Section 167. See note 1, *supra*. If there is, and if the taxpayer's proof of its wasting nature and the time over which such wasting

occurs is adequate (and is not refuted by the government), such an asset may not constitute non-depreciable goodwill or going-concern value as a matter of law. See 113 S. Ct. at 1678-1681 & n.14. Petitioner's assertion that the court of appeals incorrectly held that petitioner was not entitled to depreciate its workforce, notwithstanding evidence that the workforce would turn over with time, is insufficient to establish a conflict with this Court's decision in *Newark Morning Ledger* and the Eleventh Circuit's decision in *Citizens & Southern Corp.* v. *Commissioner*, 919 F.2d 1492 (1990). It ignores the point that none of petitioner's statistical proof that the assembled workforce would "decay" over time can transform the workforce into a customer-based intangible or other form of "property" to which depreciation could apply. (Obviously, the members of the workforce are not owned by petitioner.) Petitioner thus errs in asserting that a conflict exists among the circuits on the question presented in this case. Since no "customer-based intangible" or other revenue-generating "property" is involved here, there was no need for the court of appeals to deal with petitioner's "lifing methodology" and the proffered "future rates of decay" of the workforce (Pet. 13). No method or quantum of proof can change the workforce into a customer-based intangible.

3. Finally, the question presented in this case lacks continuing general importance. In 1993, a new provision, Section 197 of the Code, was enacted to permit, under certain conditions, amortization of the basis of acquired goodwill and certain other intangibles over a 15-year

period.[6] This new provision was made retroactive (at the taxpayer's election) to July 1, 1991. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13261(g)(2), 107 Stat. 540. One of the acquired intangibles specifically covered by the new 15-year amortization rule is "workforce in place including its composition and terms and conditions (contractual or otherwise) of its employment" (26 U.S.C. 197(d)(1)(C)(i)).

Under this new provision, taxpayers such as petitioner would be allowed an amortization deduction without regard to whether a "workforce" represents "property" within the meaning of Section 167 and also without regard to whether the taxpayer could establish a limited life and period of "decay" of the value of the workforce obtained in an acquisition.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] The new statute does not apply to any "section 197 intangible" that is created by the taxpayer. It applies only to such intangibles when acquired by purchase. 26 U.S.C. 197(c).

## APPENDIX

The Internal Revenue Code (26 U.S.C.) provides, in relevant part, as follows:

### 26 U.S.C. 167. Depreciation

**(a) General rule**

There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

### 26 U.S.C. 197 (Supp. V 1993). Amortization of goodwill and certain other intangibles

**(a) General rule**

A taxpayer shall be entitled to an amortization deduction with respect to any amortizable section 197 intangible. The amount of such deduction shall be determined by amortizing the adjusted basis (for purposes of determining gain) of such intangible ratably over the 15-year period beginning with the month in which such intangible was acquired.

**(b) No other depreciation or amortization deduction allowable**

Except as provided in subsection (a), no depreciation on or amortization deduction shall be allowable with respect to any amortizable section 197 intangible.

**(c) Amortizable section 197 intangible.**

For purposes of this section—

**(1) In general**

Except as otherwise provided in this section, the term "amortizable section 197 intangible" means any section 197 intangible—

(A) which is acquired by the taxpayer after the date of the enactment of this section, and

(B) which is held in connection with the conduct of a trade or business or an activity described in section 212.

**(2) Exclusion of self-created intangibles, etc.**

The term "amortizable section 197 intangible" shall not include any section 197 intangible—

(A) which is not described in subparagraph (D), (E), or (F) of subsection (d)(1), and

(B) which is created by the taxpayer.

This paragraph shall not apply if the intangible is created in connection with a transaction (or series of related transactions) involving the acquisition of assets

constituting a trade or business or substantial portion thereof.

* * * * *

**(d) Section 197 intangible**

For purposes of this section—

**(1) In general**

Except as otherwise provided in this section, the term "section 197 intangible" means—

(A) goodwill,

(B) going concern value,

(C) any of the following intangible items:

(i) workforce in place including its composition and terms and conditions (contractual or otherwise) of its employment,

(ii) business books and records, operating systems, or any other information base (including lists or other information with respect to current or prospective customers),

(iii) any patent, copyright, formula, process, pattern, knowhow, format, or other similar item,

(iv) any customer-based intangible,

(v) any supplier-based intangible, and

(vi) any other similar item,

(D) any license, permit, or other right granted by a governmental unit or an agency or instrumentality thereof,

(E) any covenant not to compete (or other arrangement to the extent such arrangement has substantially the same effect as a covenant not to compete) entered into in connection with an acquisition (directly or indirectly) of an interest in a trade or business or substantial portion thereof, and

(F) any franchise, trademark, or trade name.

**(2) Customer-based intangible**

**(A) In general**

The term "customer-based intangible" means—

(i) composition of market,

(ii) market share, and

(iii) any other value resulting from future provision of goods or services pursuant to relationships (contractual or otherwise) in the ordinary course of business with customers.

**(B) Special rule for financial institutions**

In the case of a financial institution, the term "customer-based intangible" includes deposit base and similar items.

**(3) Supplier-based intangible**

The term "supplier-based intangible" means any value resulting from future acquisitions of goods or services pursuant to relationships (contractual or otherwise) in the

ordinary course of business with suppliers of goods or services to be used or sold by the taxpayer.

* * * * *

**26 U.S.C. 332 (1982). Complete liquidations of subsidiaries**

**(a) General rule**

No gain or loss shall be recognized on the receipt by a corporation of propertydistributed in complete liquidation of another corporation.

**(b) Liquidations to which section applies**

For purposes of subsection (a), a distribution shall be considered to be in complete liquidation only if—

(1) the corporation receiving such property was, on the date of the adoption of the plan of liquidation, and has continued to be at all times until the receipt of the property, the owner of stock (in such other corporation) possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and the owner of at least 80 percent of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends); and either

(2) the distribution is by such other corporation in complete cancellation or redemption of all its stock, and the transfer of all the property occurs within the taxable year; in such case the adoption by the shareholders of the resolution under which is authorized the distribution of all

the assets of such corporation in complete cancellation or redemption of all its stock shall be considered an adoption of a plan of liquidation, even though no time for the completion of the transfer of the property is specified in such resolution; or

(3) such distribution is one of a series of distributions by such other corporation in complete cancellation or redemption of all its stock in accordance with a plan of liquidation under which the transfer of all the property under the liquidation is to be completed within 3 years from the close of the taxable year during which is made the first of the series of distributions under the plan, except that if such transfer is not completed within such period, or if the taxpayer does not continue qualified under paragraph (1) until the completion of such transfer, no distribution under the plan shall be considered a distribution in complete liquidation.

* * * * *

**26 U.S.C. 334 (1976). Basis of property received in liquidations**

* * * * *

**(b) Liquidation of subsidiary**

**(1) In general**

If property is received by a corporation in a distribution in complete liquidation of another corporation (within the meaning of section 332(b)), then, except as provided in paragraph (2), the basis of the property in the hands of the distributee shall be the same as it would be in the hands of the

transferor. If property is received by a corporation in a transfer to which section 332(c) applies, and if paragraph (2) of this subsection does not apply, then the basis of the property in the hands of the transferee shall be the same as it would be in the hands of the transferor.

**(2) Exception**

If property is received by a corporation in a distribution in complete liquidation of another corporation (within the meaning of section 332(b)), and if—

(A) the distribution is pursuant to a plan of liquidation adopted not more than 2 years after the date of the transaction described in subparagraph (B) (or, in the case of a series of transactions, the date of the last such transaction); and

(B) stock of the distributing corporation possessing a least 80 percent of the total combined voting power of all classes of stock entitled to vote, and at least 80 percent of the total number of shares of all other classes of stock entitled to vote, and at least 80 percent of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), was acquired by the distributee by purchase (as defined in paragraph (3)) during a 12-month period beginning with the earlier of— * * *

**(3) Purchase defined**

For purposes of paragraph (2)(B), the term "purchase" means any acquisition of stock, but only if—

(A) the basis of the stock in the hands of the distributee is not determined (i) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (ii) under section 1014(a) (relating to property acquired from a decedent),

(B) the stock is not acquired in an exchange to which section 351 applies, and

(C) the stock is not acquired from a person the ownership of whose stock would, under section 318(a), be attributed to the person acquiring such stock.

Notwithstanding subparagraph (C) of this paragraph, for purposes of paragraph (2)(B), the term "purchase" also means an acquisition of stock from a corporation when ownership of such stock would be attributed under section 318(a) to the person acquiring such stock, if the stock of such corporation by reason of which such ownership would be attributed was acquired by purchase (within the meaning of the preceding sentence).

**(4) Distributee defined**

For purposes of the subsection, the term "distributee" means only the corporation which meets the 80 percent stock ownership requirements specified in section 332(b).

* * * * *

**26 U.S.C. 334 (1982). Basis of property received in liquidations**

* * * * *

**(b) Liquidation of subsidiary**

**(2) Transfers to which section 332(c) applies**

If property is received by a corporation in a transfer to which section 332(c) applies, the basis of the property in the hands of the transferee shall be the same as it would be in the hands of the transferor.

**(3) Distributee defined**

For purposes of this subsection, the term "distributee" means only the corporation which meets the 80-percent stock ownership require-ments specified in section 332(b).

* * * * *

**26 U.S.C. 338 (1982) Certain stock purchases treated as asset acquisitions**

**(a) General Rule**

For purposes of this subtitle, if a purchasing corporation makes an election under this section (or is treated under subsection (e) as having made such an election), then, in the case of any qualified stock purchase, the target corporation—

(1) shall be treated as having sold all of its assets at the close of the acquisition date in a single transaction to which section 337 applies, and

(2) shall be treated as a new corporation which purchased all of the assets referred to in paragraph (1) as of the beginning of the day after the acquisition date.

**(b) Price at which deemed sale made**

**(1) In general**

For purposes of subsection (a), the assets of the target corporation shall be treated as sold (and purchased) at an amount equal to—

(A) the grossed-up basis of the purchasing corporation's stock in the target corporation on the acquisition date,

(B) properly adjusted under regulations prescribed by the Secretary for liabilities of the target corporation and other relevant items.

* * * * *

**(3) Allocation among assets**

The amount determined under paragraph (1) shall be allocated among the assets of the target corporation under regulations prescribed by the Secretary.

* * * * *

**(d) Purchasing corporation; target corporation; qualified stock purchase**

For purposes of this section—

**(1) Purchasing corporation**

The term "purchasing corporation" means any corporation which makes a qualified stock purchase of stock of another corporation.

**(2) Target corporation**

The term "target corporation" means any corporation the stock of which is acquired by another corporation in a qualified stock purchase.

**(3) Qualified stock purchase**

The term "qualified stock purchase" means any transaction or series of transactions in which stock of 1 corporation possessing—

> (A) At least 80 percent of total combined voting power of all classes of stock entitled to vote, and
>
> (B) at least 80 percent of the total number of shares of all other classes of stock (except nonvoting stock which is limited and preferred as to dividends), is acquired by another corporation by purchase during the 12-month acquisition period.

is acquired by another corporation by purchase during the 12-month acquisition period.

**(e) Deemed election where purchasing corporation acquires asset of target corporation**

**(1) In general**

A purchasing corporation shall be treated as having made an election under this section with

respect to any target corporation if, at any time during the consistency period, it acquires any asset of the target corporation (or a target affiliate).

**(2) Exceptions**

Paragraph (1) shall not apply with respect to any acquisition by the purchasing corpor-ation if—

(A) such acquisition is pursuant to a sale by the target corporation (or the target affiliate) in the ordinary course of its trade or business,

(B) the basis of the property acquired is determined (in whole or in part) by reference to the adjusted basis of such property in the hands of the person from whom acquired.

(C) such acquisition was before September 1, 1982,

(D) to the extent provided in regulations, the property acquired is located outside the United States, or

(E) such acquisition is described in regulations prescribed by the Secretary.

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**(g) Election**

**(1) When made**

Except as otherwise provided in regulations, an election under this section shall be made not later than 75 days after the acquisition date.

**(2) Manner**

An election by the purchasing corporation under this section shall be made in such manner as the Secretary shall by regulations prescribe.

**(3) Election irrevocable**

An election by a purchasing corporation under this section, once made, shall be irrevocable.

**(h) Definitions and special rules**

For purposes of this section—

* * * * *

**(3) Purchase**

**(A) In general**

The term "purchase" means any acquisition of stock, but only if—

(i) the basis of the stock in the hands of the purchasing corporation is not determined (I) in whole or in part by reference to the adjusted basis of such stock in the hands of the person from whom acquired, or (II) under section 1014(a) (relating to property acquired from a decedent),

(ii) the stock is not acquired in an exchange to which section 351 applies, and

(iii) the stock is not acquired from a person the ownership of whose stock would, under section 318(a) (other than

paragraph * * * (4) thereof), be attributed to the person acquiring such stock.